

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION**

DR DISTRIBUTORS, LLC,

Plaintiff/Counter-Defendant,

v.

21 CENTURY SMOKING, INC., and BRENT DUKE,

Defendants/Counterclaimant,

v.

CB DISTRIBUTORS, INC., and CARLOS BENGOA,

Counter-Defendants/Counterclaimants.

Case Number: 3:12 – cv – 50324

Judge: Frederick J. Kapala

Magistrate Judge: Iain D. Johnston

**DECLARATION OF BRIAN E.
MOFFITT IN SUPPORT OF
PLAINTIFFS' RENEWED
MOTION FOR SANCTIONS**

I, BRIAN E. MOFFITT, of full age, certify and state as follows:

1. I am an attorney at law of the States of New Jersey and New York, and I am of counsel to the law firm of Nicoll Davis & Spinella LLP, counsel for Plaintiff/Counter-Defendant DR Distributors, LLC (“DR”), and Counter-Defendants/Counterclaimants CB Distributors, Inc. (“CB”) and Carlos Bengoa (“Mr. Bengoa”) (collectively the “Plaintiffs”) in the above-captioned matter.

2. I submit this Declaration in support of Plaintiffs’ Renewed Motion for Sanctions.

3. Attached hereto as Exhibit A is a true and correct copy of a March 19, 2018 e-mail sent by Defendants’ counsel attaching and commenting upon documents produced by Defendants on that date as 21C 63515 – 63626.

4. My review of 21C 63515 – 63626, attached hereto as Exhibit A, as produced by Defendants on March 19, 2018, has revealed that the subject range includes one e-mail string involving

Frank Gu (21C 63610-63626), six other e-mails and e-mail strings exchanged by Kirti Saraswat of Webrecsol and Brent Duke using Duke's support@21centurysmoking.com address, and 49 other emails or e-mail strings exchanged by Saraswat and Duke using Duke's BrentDuke@yahoo.com account. All of the Saraswat-related e-mails contain at least one of Plaintiffs' 2014 search terms, such as "Webrecsol" and/or "keyword." The Saraswat emails appear in chronological order in Defendants' production, with the exception of one June 29, 2012 e-mail (21C 63530 – 63532) that appears in that chronology as though it were sent on June 29, "2010," rather than its actual date of 2012. With that exception, Defendants' March 19, 2018 chronological production of Saraswat e-mails begins with a March 31, 2009 e-mail and ends with an April 29, 2010 e-mail.

5. Upon reviewing Defendants' June 1, 2018 production, I discovered that Defendants had not, on March 19, 2018, produced 34 e-mails and e-mail strings that had been exchanged between Defendants and Saraswat prior to March 31, 2009, nor had they produced two other e-mails pre-dating March 31, 2009 from Duke to himself setting forth the content of his online chats with Saraswat.¹ Defendants' June 1, 2018 production also included an additional 29 e-mails and e-mail strings post-dating Defendants' alleged final communication with Saraswat on April 29, 2010, and those 29 e-mails and e-mail strings were not included in Defendants' March 19, 2018 production.² Those 29 e-mails range between May 13, 2010 and March 10, 2013, and consist of 26 e-mails and e-mails strings between Duke and Saraswat, as well a Duke e-mail to himself setting forth an online chat between them, as well as two other documents regarding Saraswat. In addition, Defendants' June 1, 2018 production included another 44 e-mails or e-mail attachments exchanged between Duke

¹ 21C 1000001, 100002, 1000004-1000016, 1000017, 1000018, 1000019, 1000020, 1000021, 1000022, 1000023, 1000034-1000036, 1000037, 1000039, 1000040, 1000041, 1000042, 1000043, 1000047, 1000148, 1000167, 1000168, 1000169, 1000170, 1000171-1000172, 1000173, 1000196-1000197, 1000203, 1000204, 1000208, 1000209, 1000210, 1000211, 1000212-1000213, 1000214-1000216, 1000217, 1000218, 1000219.

² 21C 1001342, 1001343, 1001344, 1001345, 1001346, 1001347-1001348, 1001349-1001350, 1001351-1001352, 1001353-1001374, 1001951-1001953, 1002488, 1003751, 1003752, 1003950-1003951, 1003952, 1003953, 1003954, 1003955, 1003956, 1003957, 1003958, 1003959-1003960, 1003961-1003962, 1003963-1003964, 1003971-1003973, 1003974-1003976, 1004003-1004006, 1005730-1005734, 1005720-1005724.

and Saraswat during the period March 31, 2009 and April 29, 2010,³ or regarding such communications, yet which were not included in Defendants' March 19, 2018 production. Accordingly, on March 19, 2018, while producing 112 pages, Defendants withheld a total of 109 e-mails that hit Plaintiffs' ESI search terms, including the searchs term "Webrecsol" and/or "keyword."

6. Attached hereto as Exhibit B is a true and correct copy of a June 1, 2009 e-mail string produced by Defendants on March 19, 2018 as 21C 63520.

7. Attached hereto as Exhibit C is a true and correct copy of a June 25, 2009 e-mail string produced by Defendants on March 19, 2018 as 21C 63527.

8. Attached hereto as Exhibit D is a true and correct copy of an August 17, 2009 and September 8, 2009 e-mail string produced by Defendants on March 19, 2018 as 21C 63551 - 65552.

9. Attached hereto as Exhibit E is a true and correct copy of a September 21, 2009 e-mail string produced by Defendants on March 19, 2018 as 21C 63557.

10. Attached hereto as Exhibit F are true and correct copies of a November 24, 2009 and December 4, 2009 e-mail string and December 15, 2009 string produced by Defendants on March 19, 2018 as 21C 63572 - 63574.

11. Attached hereto as Exhibit G is a true and correct copy of a December 23, 2009 e-mail string produced by Defendants on March 19, 2018 as 21C 63579.

³ 21C 1000224-1000225, 1000226, 1000227, 1000228, 1000229-1000230, 1000231-1000232, 1000233-1000234, 1000238-1000239, 1000270, 1000272 (top e-mail), 1000281-1000282, 1000283, 1000284, 1000286, 1000289-1000291, 1000305, 1000306, 1000310, 1000323 (top e-mail), 1000387, 1000390-1000391, 1000458, 1000469-1000471, 1000472, 1000473, 1000501, 1000511-1000512 (top e-mail), 1000513-1000514 (top e-mail), 1000515-1000516 (top e-mail), 1000519, 1000520, 1000521-1000525, 1000591-1000595 (top e-mail), 1000614-1000615 (top e-mail), 1000617-1000620, 1000636-1000638, 1000639-1000641, 1000689-1000695, 1000703, 1000886, 1000921 (top e-mail), 1000944-1000950, 1000955-1000956, 1000967-1000974.

12. Attached hereto as Exhibit H is a true and correct copy of a January 2010 e-mail string produced by Defendants on March 19, 2018 as 21C 63583 - 63584.

13. Attached hereto as Exhibit I is a true and correct copy of an April 29, 2010 e-mail string produced by Defendants on March 19, 2018 as 21C 63609.

14. Attached hereto as Exhibit J is a true and correct copy of a June 2012 e-mail string produced by Defendants on March 19, 2018 as 21C 63530 - 63532.

15. Attached hereto as Exhibit K is a true and correct copy of a March 2013 e-mail string produced by Defendants on June 1, 2018 as 21C 1005720 -1005724, together with the ESI version of the document.

16. Attached hereto as Exhibit L is a true and correct copy of a March 2013 e-mail string produced by Defendants on June 1, 2018 as 21C 1005730 -1005734, together with the ESI version of the document.

17. Attached hereto as Exhibit M is a true and correct copy of a March 2009 document produced by Defendants on June 1, 2018 as 21C 10000208 - 10000209.

18. Attached hereto as Exhibit N is a true and correct copy of a June 2009 e-mail string produced by Defendants on June 1, 2018 as 21C 10000310.

19. Attached hereto as Exhibit O is a true and correct copy of a July 31, 2009 e-mail produced by Defendants on June 1, 2018 as 21C 10000519.

20. Attached hereto as Exhibit P is a true and correct copy of an August 1, 2009 e-mail produced by Defendants on June 1, 2018 as 21C 10000520.

21. Attached hereto as Exhibit Q is a true and correct copy of a September 13, 2010 document produced by Defendants on June 1, 2018 as 21C 1001951 - 1001953. This document contains two and a half pages of back and forth between Duke and Saraswat regarding work on his

website and SEO. Among other topics, Saraswat and Duke discussed: his ranking in SEO for “buy electronic cigarettes” and various other terms; their review of search analytics; being in first place for the search term “blackjack electronic cigarette;” lack of improvement in rankings for non-company keywords; the issue of whether searchers know who 21CS is before they perform a search; the problem of their failure to get hits for terms where people do not already know who 21CS is; their earlier work finalizing keywords; Saraswat’s plan in September 2010 to update keyword lists; that Duke felt he was selling “Blackjack” and no one else was; Saraswat’s intent, going forward, to target only specific keywords; Duke’s statement that “right now most hits are from our stores and people going online and looking up our company;” and Saraswat’s instructions to Duke to create more SEO related articles to post.

22. Attached hereto as Exhibit R is a true and correct copy of Exhibit 5 to the May 13, 2016 deposition of Defendants’ expert Brian Brown, which he identified as his notes of his conversation with Brent Duke.

23. Attached hereto as Exhibit S are true and correct copies of relevant excerpts from the June 16, 2015 deposition of Brent Duke.

24. Attached hereto as Exhibit T are true and correct copies of relevant excerpts from the June 17, 2015 deposition of Brent Duke.

25. Attached hereto as Exhibit U are true and correct copies of relevant excerpts from the June 29, 2015 deposition of William Edmiston.

26. Attached hereto as Exhibit V is a true and correct copy of a September 10, 2013 e-mail string produced by Defendants on June 1, 2018 as 21C 1007876 - 1007877.

27. Attached hereto as Exhibit W is a true and correct copy of an October 2, 2013 e-mail produced by Defendants on June 1, 2018 as 21C 1007924 - 1007925. It attaches a 5.27 MB “.MOV”

file that was not produced with Defendants June 1, 2018 production, but which I was able to access via Defendants ESI production.

28. Attached hereto as Exhibit X is a true and correct copy of an October 4, 2014 e-mail string produced by Defendants on June 1, 2018 as 21C 1013062.

29. Attached hereto as Exhibit Y is a true and correct copy of a September 30, 2014 e-mail string produced by Defendants on June 1, 2018 as 21C 1013015.

30. Attached hereto as Exhibit Z is a true and correct copy of an October 4, 2014 e-mail string produced by Defendants on June 1, 2018 as 21C 1013068.

31. Attached hereto as Exhibit AA is a true and correct copy of a January 26, 2015 e-mail which was first produced by Defendants on May 31, 2018 as part of their ESI, but which is not found in their June 1, 2018 Bates-numbered production.

32. Attached hereto as Exhibit BB is a true and correct copy of Exhibit J to the June 29, 2015 deposition of William Edmiston. It was produced by Defendants during discovery as 21C 62840-62849.

33. Attached hereto as Exhibit CC is a true and correct copy of a May 23-25, 2012 e-mail string produced by Defendants on June 1, 2018 as 21C 1002946 - 1002947.

34. Attached hereto as Exhibit DD is a true and correct copy of a February 4, 2012 e-mail produced by Defendants on June 1, 2018 as 21C 1002518.

35. Attached hereto as Exhibit EE is a true and correct copy of a document as produced by Defendants during discovery as 21C 0431 – 0454.

36. Attached hereto as Exhibit FF is a true and correct copy of a February 10, 2013 document produced by Defendants on June 1, 2018 as 21C 1005533 - 1005558.

37. Attached hereto as Exhibit GG are true and correct copies of relevant excerpts from the June 23, 2015 30(b)(6) deposition of Brent Duke.

38. Attached hereto as Exhibit HH are true and correct copies of April 8-9, 2009 e-mail strings produced by Defendants on June 1, 2018 as 21C 1000235 - 1000239.

39. Attached hereto as Exhibit II is a true and correct copy of a January 2012 e-mail string produced by Defendants on June 1, 2018 as 21C 1002509 - 1002510, together with the ESI version of the document.

40. Attached hereto as Exhibit JJ is a true and correct copy of Exhibit 15 to the June 17, 2015 deposition of Brent Duke.

41. Attached hereto as Exhibit KK is a true and correct copy of a January 8, 2009 document produced by Defendants on June 1, 2018 as 21C 1000004 - 1000016.

42. Attached hereto as Exhibit LL is a true and correct copy of a July 24, 2009 e-mail produced by Defendants on June 1, 2018 as 21C 1000474 - 1000500.

43. Attached hereto as Exhibit MM is a true and correct copy of an August 3, 2009 e-mail produced by Defendants on June 1, 2018 as 21C 1000526 - 1000586.

44. Attached hereto as Exhibit NN is a true and correct copy of a September 3, 2009 e-mail produced by Defendants on June 1, 2018 as 21C 1000650 - 1000654.

45. Attached hereto as Exhibit OO is a true and correct copy of an October 6, 2009 e-mail produced by Defendants on June 1, 2018 as 21C 1000697 - 1000702.

46. Attached hereto as Exhibit PP is a true and correct copy of an October 7, 2009 e-mail produced by Defendants on June 1, 2018 as 21C 1000713 - 1000719.

47. Attached hereto as Exhibit QQ is a true and correct copy of an October 9, 2009 e-mail produced by Defendants on June 1, 2018 as 21C 1000728 - 1000730.

48. Attached hereto as Exhibit RR is a true and correct copy of an October 9, 2009 e-mail produced by Defendants on June 1, 2018 as 21C 1000731 - 1000734.

49. Attached hereto as Exhibit SS is a true and correct copy of an October 9, 2009 e-mail produced by Defendants on June 1, 2018 as 21C 1000735 - 1000736.

50. Attached hereto as Exhibit TT is a true and correct copy of an October 11, 2009 e-mail string produced by Defendants on June 1, 2018 as 21C 1000737 - 1000800.

51. Attached hereto as Exhibit UU is a true and correct copy of a February 6, 2010 e-mail produced by Defendants on June 1, 2018 as 21C 1001077 - 1001140.

52. Attached hereto as Exhibit VV is a true and correct copy of a December 18, 2009 e-mail produced by Defendants on June 1, 2018 as 21C 1000957 - 1000958.

53. Attached hereto as Exhibit WW is a true and correct copy of a June 4, 2012 e-mail string produced by Defendants on June 1, 2018 as 21C 1003095 -1003099, together with the ESI version of the document.

54. Attached hereto as Exhibit XX is a true and correct copy of Defendants' November 26, 2012 Initial Disclosures.

55. Attached hereto as Exhibit YY is a true and correct copy of an email string regarding Defendants' November 26, 2012 Initial Disclosures.

56. Attached hereto as Exhibit ZZ is a true and correct copy of relevant excerpts from Defendant 21 Century Smoking, Inc.'s February 15, 2013 Response to DR Distributors, LLC's First Set of Interrogatories.

57. Attached hereto as Exhibit AAA is a true and correct copy of a February 13, 2013 e-mail produced by Defendants on June 1, 2018 as 21C 1005570 -1005571.

58. Attached hereto as Exhibit BBB is a true and correct copy of the most recent privilege log produced by Defendants, encompassing their June 1, 2018 production.

59. My review of Defendants' 2013 through 2015 productions reveals that Defendants were, during discovery, able to locate and produce over one hundred "sent" e-mails from Duke's support@21centurysmoking.com e-mail account, despite Defendants' current claim that such e-mails had already been "auto-purged" up to three years before the litigation commenced in 2012. The year of authorship, and quantity of the above-referenced sent e-mails, by year, is as follows:

1. 2009: 11
2. 2010: 65
3. 2011: 19
4. 2012: 6
5. 2013: 6 (with five of those no later than March of that year).

60. The Bates numbers of the e-mails referenced in the preceding paragraph are as follows: 21C 81-82, 83, 84-141, 151-154, 261-263, 342-343, 398, 399, 408, 572, 615-616, 748-750, 767, 768, 1839-1840, 52613-52615, 52617-52618, 52622-52624, 52635-52637, 52638, 52660, 52661, 52662, 52663-52707, 52708, 52709, 52710, 52711, 52712-52732, 52733-52753, 52754-52774, 52775-52795, 52796-52807, 52808, 52809, 52810, 52811, 52812, 52813, 52814, 52815, 52816, 52818, 52819-52824, 52831, 52832-52840, 52841-52844, 52845, 52846, 52847, 52860-52861, 52862-52868, 52869, 52870-52871, 52872-52903, 52915-52916, 52917-52918, 52919, 52920-52921, 52922, 52923-52924, 52939, 52940, 52941, 52942, 52943, 52944, 52945, 52946-52948, 52949, 52950, 52976-52978, 52979-52980, 52981-52983, 53398, 53479, 53508, 53510, 53518-53519, 54625-54626, 54627, 54629, 54630-54631, 54654, 54655, 54662, 54672, 54673, 54674, 54675, 54676, 54679-54680, 54681, 54692, 54693, 54694, 54695, 54696, 54697, 54698, 54758, 54759, 54784, 54806-54807, 54847, 54865, 54869, 54870, 54881, and 54908-54909.

61. A search of Defendants' May 31, 2018 ESI production in native format for "bduke@21centurysmoking.com" reveals that 1,751 e-mails in that May 31 production were addressed "to" bduke@21centurysmoking.com, with that address being "cc'd" on another 780 such e-mails, for a total of 2,531 such e-mails.

62. A search of Defendants' May 31, 2018 ESI production in native format for communications between Duke and Frank Gu reveals that such communications took place between 2009 through at least 2015. A search of that production for communications between Duke and Kirti Saraswat reveals that such communications took place between 2009 through at least 2013.

63. Attached hereto as Exhibit CCC is a true and correct copy of a June 12, 2015 e-mail from Defendants' counsel, Travis Life, Esq.

64. Attached hereto as Exhibit DDD is a true and correct copy of relevant e-mails from Defendants' March 19, 2018 production, which reference the existence of online chat communications between Brent Duke and Kirti Saraswat of Webrecsol. These e-mails include:

- 21C 63552 - Duke: "kirti, I urgently need your help..can you please come online sometime soon? paypal has shut down my account and I need help installing a shopping cart..."
- 21C 63572 - Kirti: "Hi Brent, can you please come online today so we can chat and i can tell you how to place my email id...", and Duke response: "... so if you want to come online and show me you can, but I didn't see you here th times I logged on today."
- 21C 63574 - Kirti: "... Also can you please come online at yahoo i need to discuss with you regarding the site changes...."
- 21C 63530 - Kirti: "Are you not online at any messenger? We can chat...."

65. Attached hereto as Exhibit EEE is a true and correct copy of relevant e-mails from Defendants' June 1, 2018 production, which reference the existence of online chat communications between Brent Duke and Kirti Saraswat. These e-mails include:

- 21C 1000018 – Duke: "you coming online today? ... buzz me if you do!"
- 21C 1000004 – 1000016: "Our chat on Thu, 1/8/09 3:18 PM ... chat with seo examples of kirti"
- 21C 1000148 - Duke: "from chat after you left..."
- 21C 1000167 – Duke: "where are you...you asked for money all last night and now you are not getting online?"
- 21C 1000170 – Duke: "are you coming online?"
- 21C 1000173 – Duke: "can you come online... is there some reason why you aren't coming online? ... i sent you an email that had the ftp details, and until you come online, this site is never going to be up."
- 21C 1000208 – 1000209: "Our chat on Mon, 3/16/09 1:48 PM"
- 21C 1000211 – Duke: "it looks like you are online, but you aren't responding to my messages...i need some help with the headers on my site..."
- 21C 1000218 – Duke: "i couldn't hear you on the phone at all..."
- 21C 1000219 – Duke: "can you come online when you get a chance?"
- 21C 1000283 - Duke: "I don't see you online anymore,..."
- 21C 1000655 - Duke: "kirti, I urgently need your help..can you please come online sometime soon? paypal has shut down my account and I need help installing a shopping cart..."

- 21C 1000938 - Kirti: "Hi Brent, can you please come online today so we can chat and I can tell you how to place my email id..."
- 21C 1001351 - Kirti: "...i can't attach all those files through emails, so could you please come online at g-talk so that I can send you through g-talk..."
- 21C 1001951 – 1001953: "Our chat on Mon, 9/13/10 7:45 PM"
- 21C 1003752 - Kirti: "Are you not online at any messenger? We can chat...."

66. My electronic search of Defendants' May 31, 2018 ESI production, as sourced from Duke's BrentDuke@yahoo.com account, resulted in 181 hits on support@21centurysmoking.com in the top, or most recent, e-mail in a given e-mail chain. Of those 181 hits, support@21centurysmoking.com appeared in the "from" field 129 times, in the "to" field 45 times, and in the "cc" field 7 times.

67. The hits in the "from" field are found in Defendants' June 1, 2018 paper/Bates-numbered production at 21C 1001438, 1001992-1001994, 1001997, 1002002, 1002003, 1002067, 1002068, 1002074-1002076, 1002077-1002078, 1002081, 1002110, 1002179, 1002183, 1002257-1002261, 1002496, 1002499, 1002501-1002503, 1002504, 1002696, 1002808, 1002886-1002888, 1002889, 1003051-1003070, 1003167, 1003993, 1004020, 1004025, 1004037-1004038, 1004306-1004308, 1004315-1004317, 1004339-1004340, 1004341-1004343, 1004363, 1004784-1004786, 1004787-1004789, 1004790-1004791, 1004836-1004837, 1004838-1004840, 104881-1004884, 1004892-1004894, 1005155-1005157, 1005260-1005261, 1005533-1005558, 1005696-1005697, 1005735, 1006344, 1006945-1006946, 1007273-1007282, 1007368-1007371, 1007372-1007379, 1007381-1007384, 1007385-1007388, 1007393-1007396, 1007567-10017569, 1007574-1007578, 1007579-1007580 (Redacted), 1007584-1007586 (Redacted), 1007589-1007590 (Redacted), 1007591-1007592 (Redacted), 1007596-1007598 (Redacted), 1007605-1007607, 1007608-

1007610, 1007625-1007626 (Redacted), 1007627-1007628, 1007639, 1008070-1008071, 1008077-1008079, 1008114-1008115, 1008248, 1008251-1008252, 1008332-1001008338, 1008392-1008394, 1008454-1008462, 1008695, 1008730, 1009366-1009370, 1009527-1009530, 1009793-1009796, 1009813-1009816, 1009858-1009859, 1009922, 1009949-1009950, 1009951-1009952, 1009953-1009954, 1009955-1009956, 1009958-1009959, 1009962-1009963, 1009975-1009976, 1009988-1009989, 1010173-1010174, 1010271-1010272, 1010280-1010281, 1010610-1010611, 1010758, 1010952-101953, 1011077-1011078, 1011088-1011089, 1011189 (Redacted), 1011190-1011192, 1011193-1011194 (Redacted), 1011753-1011755, 1011766-1011767, 1011775-1011776, 1012268-1012279, 1012415-1012416, 1012619-1012620, 1012621-1012623, 1013129-1013130, 1013279-1013280, 1013286-1013287, 1013288-1013289, 1013345-1013346, 1013550-1013552, 1014036-1014040, 1014117-1014118, 1014242-1014243, 1014282-1014283, 1014456-1014457, 1014498-1014499, 1014500-1014501, 1015045-1015052, 1015053-1015078, 1015079-1015108, 1015297-1015299, 1015300-1015303, 1015304-1015305, 1015306-1015308, 1015553-1015556, 1015557, 1015712-1015713, 1015865, 1015869-1015870, 1015871.

68. The hits in the “to” field are found in Defendants’ June 1, 2018 paper/Bates-numbered production at 21C 1001353, 1001414, 1001925-1001926, 1001969-1001970, 1002071-1002073, 1002170, 1002214-1002215, 1002500, 1002511, 1002921, 1003222, 1003843, 1003857-1003859, 1003928-1003930, 1003943, 1004899-1004902, 1004927-1004928, 1004961, 1005159, 1005179, 1007577-1007578, 1007581-1007583 (Redacted), 1007587-1007588 (Redacted), 1007593-1007595 (Redacted), 1007917-1007920, 1007946, 1008062, 1008072, 1008135-1008139, 1008445-1008453, 1008475-1008485, 1008517, 1009375, 1009661, 1009957, 1009960-1009961, 1009965, 1009966, 1010273-1010274, 1010275, 1015860-1015864.

69. The hits in the “CC” field are found in Defendants’ June 1, 2018 paper/Bates-numbered production at 21C 1002774-1002775, 1003871-1003874, 1003875-1003878, 1004050, 1004265-1004266.

70. The hits in more than one field are found in Defendants’ June 1, 2018 paper/Bates-numbered production at 21C 1001415 (From and To).

71. Accompanying Defendants’ June 1, 2018 Bates-stamped, paper production was a letter, a true copy of which is attached hereto as Exhibit FFF, in which Defendants’ counsel, Peter Stamatis, wrote: “As we previously advised, we did not print the spam emails that the search terms generated, though they should appear in the digital files we sent today.”

72. Earlier, during a May 17, 2018 Court conference, Stamatis stated to the Court that the ESI documents that were not printed and Bates-numbered by Defendants in assembling their June 1, 2018 paper production were either privileged or “were just things that were not responsive or were ancillary. So those were culled out, too...They were documents from a trading account that had nothing to do with this.” Dkt. 256 at p. 21.

73. In response to the Court’s question as to why Defendants did not produce all documents that hit on Plaintiffs’ search terms, Stamatis went on to state: “One of the search terms was the word ‘trademark,’ so that was triggering a lot of things. So you would have TD Ameritrade say, for example, is a registered trademark or something, so that would trigger that. There were other, you know, documents related, off the top of my head, to the Mercantile Exchange or one of the exchanges had a trademark. There were some e-mails from Mr. Duke’s mother. There were some e-mails that were strictly on a personal level between Mr. Duke and Mrs. Duke.” Dkt. 256 at p. 22. Counsel stated that this was consistent with their past practices in producing documents. *Id.*

74. A side-by-side comparison of Defendants' 2018 ESI and paper productions reveals that there are dozens, if not hundreds, of documents in Defendants' ESI set that are responsive and relevant, but which Defendants did not print, Bates number and produce in their June 1, 2018 paper production. Nor did they log them on their privilege log. Plaintiffs would not be in possession of these documents had the Court not, on May 17, 2018, instructed Defendants to also produce their ESI in native format.

75. As to Defense counsel's representation to the Court on May 17, 2018, that they were then planning to withhold e-mails between Duke and his mother, attached hereto is Exhibit GGG. It is a true and correct copy of such an e-mail, dated February 8, 2009, which was never before produced and is now found only in the ESI, which Defendants did not print and were not going to produce but for the Court's May 17, 2018 instructions. It has been redacted to omit wholly personal aspects of their conversation. In this document, Duke and his mother discuss work on his website, her efforts to sign up e-cigarette customers on Duke's website, the amount of website hits and sales, as well as Duke's plans to launch another website selling lower cost e-cigarettes. Duke also discusses choosing Chinese suppliers, potential website layouts for the other site, ordering, an advertising budget, and beginning to focus on SEO, explaining to his mother what SEO was and how it worked.

76. As to Defense counsel's representation to the Court on May 17, 2018, that they were then planning to withhold "personal" e-mails between Duke and his wife, attached hereto is Exhibit HHH. It is a true and correct copy of such an e-mail, dated September 7, 2009, which was never before produced and is now found only in the ESI, which Defendants did not print and were not going to produce but for the Court's May 17, 2018 instructions. It has been redacted to omit wholly personal aspects of their conversation. In Defendants' Initial Disclosures, attached hereto as Exhibit XX, they identified Duke's wife, Laurie Duke, as having "knowledge relating to the use of the mark

21 CENTURY SMOKING by Defendant and sales and marketing efforts with respect to products and services offered under the mark 21 CENTURY SMOKING.” In this e-mail, they discuss their personal relationship with Bryan Scott Kos, Duke’s work on the 21 Century Smoking website, lost sales, Kirti Saraswat’s work on Defendants’ website, the previously undisclosed “SportsDoctrine website, Defendants being banned from PayPal and Duke having to personally add ZenCart to Defendants’ website as a replacement, Duke’s understanding of SEO tactics and keywords, advice he received from Otis Chandler, and being turned down for merchant accounts.

77. Attached hereto as Exhibit III are several more e-mails found only in Defendants’ ESI production, which they did not print or Bates number and were not going to produce but for the Court’s May 17, 2018 instructions. Each of these e-mails are dated between November 2013 and January 2014 and were never before produced. They reveal that William Edmiston’s girlfriend and now wife, Kai Sibley, was working with Defendants to sell their Blackjack and other e-cigarette products at or about the time Defendants claim she witnessed alleged defamatory statements. In Defendants’ March 19, 2018 summary judgment brief, they represented to the Court that Sibley, allegedly unlike Edmiston, was an independent third-party, with no relationship to Defendants’ business. Dkt. 233 at p. 21. They argued that summary judgment should not be entered dismissing their defamation claims because there was publication of the alleged defamatory comments to Sibley, and not just to Defendants’ authorized agent and stock options holder, Edmiston.

78. Defendants’ counsel argued: “DR’s claim that this [defamation] count should be dismissed because the defamatory statements were made to 21CS’s agent ignores the fact that regardless of whether Bill Edmiston’s arrangement with 21CS made it its agent, there was another person present: Kai Sibley. SOF ¶ 100-115. As no one alleges Ms. Sibley was 21CS’s agent, she is a third-person to whom the defamatory statements were made.” Dkt. 233 at p. 21. At the time they

made this argument, Defendants were in possession of the e-mails documenting the fact that Sibley was also working to sell Defendants products and profiting from same. Thereafter, in May 2018, they then chose not to print and Bates number those documents for production.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: March 25, 2019

/s/ Brian E. Moffitt
BRIAN E. MOFFITT